Supreme Court, U.S.
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In The

Supreme Court of the United States

WAYNE ANTHONY ROSS, REPUBLICAN PARTY OF ALASKA, INC., ALASKA LIBERTARIAN PARTY, ALASKAN INDEPENDENCE PARTY, MARK CHRYSON AND LINDA S. McKAY,

Petitioners,

v.

STATE OF ALASKA, STATE OF ALASKA DIVISION OF ELECTIONS, LIEUTENANT GOVERNOR FRAN ULMER, IN HER OFFICIAL CAPACITY OF SUPERVISOR OF ELECTIONS, AND SANDRA J. STOUT, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF ELECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether it would serve the best interests of judicial administration to grant the petition permitting a decision on questions involving the validity of Alaska's open primary statutes which were not briefed by the parties or considered by the district court and the court of appeals?

2. Whether this Court lacks jurisdiction because the Libertarian Party of Alaska and the Alaska Independence Party failed to allege an actual case or controversy involving a violation of their First Amendment rights by application of the open primary required by the laws of Alaska?

3. Whether the Court should grant certiorari so that petitioners' federal civil rights claims involving the Alaska open primary can be considered along with a challenge to the open primary statutes of the State of California?

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STATEMENT OF FACTS AND PROCEEDINGS

Respondents State of Alaska, Lieutenant Governor Fran Ulmer, and the director of the division of elections (hereinafter "the state") adopts and incorporates by reference the statement of facts and proceedings contained in the decision of the United States Court of Appeals, Ninth Circuit in *Ross v. State of Alaska*, 189 F.3d 1107 (9th Cir. 1999); Pet. App. 2, 3.

To properly convey the odd posture of this case, it is necessary to set out the following additional facts pertinent to a consideration of the petition. The Republican Party of Alaska (hereinafter "the RPA") was precluded from relitigating certain issues in this case that were previously decided by the Alaska Supreme Court in *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996). This result was announced in a grant of partial summary judgment by the District Court of Alaska in favor of the state.[1] App. 22-44. The attention of the district court was then directed to the claims of the Alaskan Independence Party and Libertarian Party of Alaska (hereinafter "the minor political parties") through consideration of a motion to dismiss brought by the state. As a result, the claims of the minor parties were dismissed for lack of a proper case or controversy. App. 45-62.

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[1] The district court's decision specified the following issues as being barred from relitigation: (1) whether Alaska's primary laws are per se unconstitutional if the laws conflict with the rules of the political parties; (2) whether Alaska's blanket primary requirement violates the RPA's First and Fourteenth Amendment rights; and (3) whether the State of Alaska must alter its primary election laws to conform with the Rules of the RPA.

The trial date set by the court was canceled and the plaintiffs below, after reserving the right to appeal, subsequently agreed to a dismissal of the case without prejudice. App. 63-64. The RPA and the minor political parties subsequently filed a notice of appeal asking the Ninth Circuit Court of Appeals for relief from the orders of the District Court of Alaska. App. 65-66. However, in their brief on appeal, in addition to alleging that the district court erred in precluding the relitigation of the RPA's First Amendment claims, petitioners argued the merits of these claims. App. 67-69. This strategy presented a question that was not decided by the District Court for Alaska. The Ninth Circuit Court of Appeals did not address this question when it affirmed the decisions and orders of the District Court of Alaska.

The state will address certain other anecdotal evidence offered as fact by the petitioners so that it is a matter of record that the assertions are not accepted as true. These facts relate to the First Amendment claims of petitioners concerning the conduct of the 1998 primary election. These facts were never established at trial because *O'Callaghan* was given preclusive effect to bar the relitigation of issues by the RPA in the case at bench.

Petitioners allege facts involving an unwanted candidate for the Alaskan Independence Party nomination for the office of governor at the 1998 primary. Pet. at 21. They assert that the Alaskan Independence Party was "stuck" with a candidate standing for the 1998 primary election that it did not want or support. Pet. at 1 n.1. However, these "facts" address First Amendment claims that were dismissed by agreement of the parties and approved by the district court. App. 63-64. This claim has no relation

to First Amendment claims involving the open primary which center on whether persons not affiliated with the party can nominate party candidates to stand for general election. Rather, these facts relate to a claim addressing whether and under what conditions the party can restrict who may affiliate with it as a candidate.

Petitioners also offer as evidence conclusions about the failed candidacy of the nominee of the Republican Party of Alaska running for governor at the 1998 general election. Pet. at 24-26. These events arose after the district court ruled on the state's motion for summary judgment and were the subject of a motion in which the Ninth Circuit Court of Appeals was requested to take judicial notice of these events for the purposes of appeal. The motion was opposed by the state. App. 70-76. The petitioner's motion was subsequently denied by the Court of Appeals.[2] App. 77. Finally, there is reference to events that occurred during the 1974, 1978, 1984 and 1990 election cycles which are claimed to present evidence of cross-over voting. Pet. at 17 and 18. The state did not have the opportunity to analyze this evidence below, lacks sufficient knowledge to agree or disagree with the conclusions drawn from these events, and should not be

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[2] This evidence is apparently offered to show the evil caused by an open, blanket primary on Alaskan politics. Rather, it is more likely that these facts support a revision of the state's campaign finance statutes to put in place limits on a candidate's use of his or her own money to finance a campaign for governor. Alaska's campaign finance reform legislation is currently the subject of a pending petition for a writ of certiorari in *Alaska Civil Liberty Union v. State of Alaska*, Docket No. 99-128.

required to rebut these facts and conclusions for the first time on appeal.

REASONS FOR DENYING THE WRIT

None of the criteria governing certiorari warrant granting the petition. First, the Court lacks jurisdiction based on the district court's determination that the claims alleged by the minor political parties do not state a proper case or controversy and are therefore not ripe for judicial resolution. Second, the district court properly determined, and the Court of Appeals correctly affirmed, that the RPA was precluded from relitigating issues pertaining to First Amendment claims previously decided by the Alaska Supreme Court in *O'Callaghan*. Nothing in these decisions conflicts with any state or federal court decision. In carefully reviewing the *O'Callaghan* decision, moreover, the district court and the Court of Appeals found that the decision of the Alaska Supreme Court is entitled to preclusive effect.

Nor is there any reason to consider this case in connection with the pending petition in *California Democratic Party v. Jones*, Docket No. 99-401. That case presents the question whether the California open, blanket primary burdens the First Amendment rights of major and minor political parties organized under the laws of that state. Even though petitioners decline to address it, this case involves the question whether a decision of the Alaska Supreme Court upholding Alaska's open, blanket primary should be given preclusive effect to bar relitigation in a subsequent federal case.

I. THE COURT LACKS JURISDICTION BECAUSE THE MINOR POLITICAL PARTIES FAILED TO PROPERLY ALLEGE A CASE OR CONTROVERSY.

The state successfully argued below that the district court should defer jurisdiction until the minor political parties determine the content of their rules, specify the authority under which the rules are adopted, and petition the state for their adoption in a concrete proceeding. App. 45-62. It was established to the satisfaction of the district court that the minor political parties had never petitioned the state to implement a nominating process and that neither the parties nor the state had sought preclearance of party rules from the United States Department of Justice under Section 5 of the Voting Rights Act of 1965. App. 55-59.

The district court also found, and the Court of Appeals agreed, that the complaint did not allege any action to institute a nomination procedure in contravention of the state's open primary law. Pet. App. at 13-15. The Court of Appeals cited as an example the rule of the Alaskan Independence Party which seeks the permission of state law as a condition of the party exercising its power of nomination.[3] *Id.* The district court was confronted with other contradictory evidence which

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[3] Alaskan Independence Party Rule 5.15 states:

> In any election for public office where the Alaskan Independence Party is authorized by law to nominate a candidate, the State Committee shall be empowered to present a nominee in the name of the Alaskan Independence Party or to reject a candidate not an Alaskan.

caused it to question whether there was a true controversy.[4] App. 53-59. The Court of Appeals correctly decided that the district court's questions were well founded. Pet. App. 12-16.

At the time that the district court was considering its jurisdiction to hear claims of the minor political parties, the Libertarian Party of Alaska was not a recognized political party. As a political group, the Libertarians were free to select candidates using methods that did not conflict with state law.[5] Additionally, the complaint was found deficient because no allegations were set out defining how the Alaskan Independence Party intended to select its candidates. Pet. App. at 15. Nor did the minor political parties make a sufficient showing that they were placed under an undue hardship if they were denied a forum to seek a nomination process separate from the state's open primary.

Ripeness is to be determined by the application of a two-part test. *See Abbott Laboratories v. Gardiner*, 387 U.S. 136, 149 (1967), *overruled on other grounds*; *Califano v. Sanders*, 430 U.S. 99 (1977). Ripeness requires an evaluation of "the fitness of the issues for judicial decision and

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[4] For example, Alaskan Independence Party Rules Article IX provides:

> The Alaskan Independence Party (AIP) believing in the principle of voting for the individual, does establish *an open primary election* which lists all parties' candidates for office, consistent with applicable law.

[5] State law provides ballot access by petition for political groups or nonpartisan candidates. AS 15.25.120, AS 15.25.180-15.25.190.

hardship to the parties of withholding court consideration." *Id.* Ripeness is "peculiarly a question of timing." *Regional Rail Reorganization Cases,* 419 U.S. 102, 140 (1974).

The Court of Appeals correctly determined that the claims of the minor political parties were unfit for judicial decision because they "cannot demonstrate a substantial controversy . . . of sufficient immediacy and reality." Pet. App. at 16 (citation omitted). The administration of justice would benefit from a refusal of jurisdiction until the policies of the minor political parties and the state's response to those policies assume a more concrete form. Attempts by the minor political parties to allege facts in support of their claims which unfolded some time after their complaint was filed does not remedy the jurisdictional defect. The district court was correctly governed by the very basic proposition that subject matter jurisdiction must exist from the time suit is commenced, and cannot be acquired retroactively. App. 48-49.

This case is a singularly ill-suited vehicle to address any of the questions presented by the minor political parties. To grant the petition would entangle the Court in abstract disagreements which have yet to take on a concrete form and would amount to an advisory opinion on the questions of law presented.

II. THE PETITIONERS PRESENT QUESTIONS WHICH WERE NOT ADDRESSED IN THE DECISIONS ADVERSE TO THEM RENDERED BY THE DISTRICT COURT OF ALASKA AND THE NINTH CIRCUIT COURT OF APPEALS.

Petitioners do not present questions for review by the Court that address issues decided by the lower federal courts in this case. According to the Court of Appeals, it was resolving challenges of

> (1) the grant of partial summary judgment by the district court to the state on the basis of "issue preclusion" which prevents the Republican Party from relitigating the issues decided in *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996); and
>
> (2) the district court's dismissal of the claims of minor political parties for lack of a case or controversy.

Pet. App. at 4. The focus of the Court of Appeals was justified by the scope of the decision below in the district court which also dealt exclusively with these issues. App. 5.

Rather than address questions decided below, petitioners present the Court with questions going to the "core issue" relating to the merits of their federal civil rights claims involving the validity of Alaska's open primary. Petitioners relegate to a footnote their argument directed to the actual questions decided by the district court and affirmed by the Court of Appeals. Pet. at 1, n.1. In their footnote, petitioners merely state the conclusion that the decision on issue preclusion and ripeness are erroneous. They offer no argument and cite no authority

to explain why the decision of the Court of Appeals is erroneous. Rather, they claim these are "technical" elements of the decisions below and appear to assert that the court may dispense with them and proceed directly to the merits of their First Amendment claims. No argument in support of granting the writ is made to the effect that the circumstances of the RPA qualify under the exceptions for giving preclusive effect to a prior state court judgment on a federal claim.

If this invitation to digress from the issues joined below is accepted, the Court would be permitting the petitioners a second opportunity to appeal the *O'Callaghan* decision. The questions presented by petitioners have not been fully briefed by the parties within the context of this case, and were never squarely presented to the courts below. Further, the district court did not make factual findings on issues necessary to resolve the questions presented.

> Ordinarily, this Court does not decide questions not raised or involved in the lower court.

Youakim v. Miller, 425 U.S. 231, 234 (1976) (citations omitted).[6] The state realizes that this is not an inflexible rule.

> It is only in exceptional cases coming here from the federal courts that questions not pressed or passed on below are reviewed.

Duignan v. United States, 274 U.S. 195, 200 (1927). When appeal was taken from the decision of the district court, the grounds stated were limited to the orders granted by

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[6] *See also United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Adickes v. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

that court. App. 65-66. Nothing in those orders directly addressed the validity of the open primary statute of Alaska in the context of a First Amendment challenge. The order in question considered only whether the RPA was precluded from relitigating certain issues in federal court. The Court of Appeals addressed only the issue preclusion and ripeness grounds in its decision on appeal.

The state is cognizant of the Court's discretion to consider "purely legal questions" presented in the petition even though not addressed by a lower court. *See Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982), and *Mitchell v. Forsyth*, 472 U.S. 511 (1985). However, there is nothing exceptional about this case other than the way in which petitioners have ignored the scope of the decisions below and sought to use this case as a means of appealing the decision of the Alaska Supreme Court in *O'Callaghan*.

Resolution of the petitioners' formulation of the "core issue" depends on the development of facts necessary to establish the legitimacy of the state's interest in imposing a blanket, open primary. Petitioners reinforce this by an attempt to support their case on the merits by reference to several examples of alleged cross-over voting in past primary elections. In any case, the question of the validity of Alaska's blanket, open primary is not a purely legal question. App. at 38. Denial of certiorari does not leave petitioners without a remedy. The minor political parties are unencumbered from the issue preclusion bar applicable to the RPA and are free to file a new action which they have stated to be their intention. Pet. at 1, n.1 and 23.

This case is not an appropriate vehicle to address the validity of the open primary under the laws of Alaska. The petitioners are asking the Court to brush aside an essential element of judicial restraint.

> . . . [R]es judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication but also promote the comity between state and federal courts that has been recognized as the bulwark of the federal system.

Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 415 (1980). Petitioners cannot disguise their true purpose which is to overturn *O'Callaghan*.

> It is settled that 'horizontal' appeals will not lie to the United States District Courts to overturn allegedly erroneous decisions on federal constitutional questions by the highest court of a state.

Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) (citing *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). This case is not an appropriate vehicle to resolve the First Amendment claims of petitioners. To grant the intended relief would undercut the underlying justification for the issue preclusion doctrine; that is, judicial economy and repose, and prevention of repetitive litigation.

III. IT IS NOT APPROPRIATE TO CONNECT THIS CASE WITH THE PENDING PETITION INVOLVING THE CALIFORNIA OPEN PRIMARY.

Even if the Court subsequently grants the pending writ for certiorari and reverses *California Democratic Party v. Jones*, Docket No. 99-401, it does not follow that the

decision would apply to the facts relevant to the Alaskan open primary system which are justified by interests different from those advanced by California. In *O'Callaghan*, the Alaska Supreme Court found that the state had met its burden of establishing that its regulatory interests are sufficiently weighty to justify the limitation on the party's rights. The state offered that the open primary encourages voter turnout by maximizing voters' freedom of choice among candidates. The state also asserted that a blanket, open primary tends to ensure that the officers elected are representative of the people to be governed in that major political parties must have a broad cross-section of support from the voters. 914 P.2d at 1261-62. These benefits were seen to have special importance because most of the voters in Alaska are either nonpartisan or undeclared.

> In Alaska, where a majority of voters are not affiliated with any party, a closed or partially-closed primary system can plausibly be viewed as bestowing on a minority of the electorate a disproportionately powerful role in the selection of public officeholders. If political parties and politically affiliated voters are to have more power in the election process, that is power taken from unaffiliated voters.

Id.

A decision in *California Democratic Party* would not materially change controlling legal principles so as to prevent issue preclusion based on *O'Callaghan*. *See Montana v. United States*, 440 U.S. 147, 161 (1979) (doctrine of issue preclusion operates unless there have been major

changes in law). The ultimate question presented in *California Democratic Party* is whether California has satisfied the standard of review applied to restrictions on First Amendment rights of a political party. The standard of review is the controlling legal principle that *O'Callaghan* shares with *California Democratic Party*.

The Alaska Supreme Court applied the more deferential standard of review applied in *Burdick v. Takushi*, 504 U.S. 428 (1992).[7] The foregoing expression of the standard of review is consistent with the Court's most recent application of it to a state election statute regulating the activity of a political party. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (state's asserted regulatory interests in anti-fusion statute were sufficiently weighty to justify limitation on rights of political party).

There is no reason to grant certiorari to review this case because *O'Callaghan* can be given preclusive effect as a correct application of the standard of review. Once again, to do so would further the underlying justification for the issue preclusion doctrine; that is, judicial economy and repose, and prevention of repetitive litigation.

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[7] The Alaska Supreme Court quoted at length from *Burdick*, concluding with the following:

> . . . But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions. . . .

914 P.2d at 1254.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WAYNE ANTHONY ROSS, et al., Plaintiffs, vs. STATE OF ALASKA, et al., Defendants.	)	No. A95-0053-CV (HRH)

ORDER

Motion for Partial Summary Judgment

The defendant State of Alaska moves for partial summary judgment.[1] This motion is opposed.[2] Oral argument has been heard.

I.

FACTS

The plaintiffs are the Republican Party of Alaska, Incorporated ("RPA"), the Alaska Libertarian Party, the Alaskan Independence Party, Wayne Anthony Ross, Linda S. McKay, and John B. Coghill. Mr. Ross is a Republican national committeeman and a registered Republican voter in the State of Alaska. Ms. McKay is a registered Republican voter in the State of Alaska. Mr. Ross and Ms. McKay object to members of political parties other than

[1] Clerk's Docket No. 61.

[2] Clerk's Docket No. 64.

the Republican party participating in choosing Republican party candidates for public office. Ms. McKay further believes that the candidate selection process should be conducted in accordance with the rules of her party. Mr. Coghill is a registered Alaskan Independence Party voter in the State of Alaska. At the time of the filing of the third amended complaint, he was chair of the party as well.[3] Mr. Coghill desires to vote in his party primary election and to select the candidates to represent his party in a manner consistent with the rules of his party.

Defendants are the State of Alaska, the State of Alaska Division of Elections, Fran Ulmer, in her official capacity as Supervisor of Elections, Sandra J. Stout, in her official capacity as Director of the Division of Elections, and Jane and John Does 1 through 10.

Plaintiffs bring a 42 U.S.C. § 1983 action for violation of their federal civil rights; this action was originally filed in federal district court in February of 1995. This action was stayed in January 1996, pending the Alaska Supreme Court's adjudication of *O'Callaghan v. State*[4] and again in January 1997 pending the RPA's petition for a writ of *certiorari* to the United States Supreme Court in *O'Callaghan*. Because the United States Supreme Court did not grant the RPA's petition, this case became active again in

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[3] The State submits a news report stating that Mr. Coghill quit his position as party chair following a disagreement as to the party's future. Clerk's Docket No. 67, Ex. 1. There is no assertion that this change in office affects his status as a member of the Alaskan Independence Party.

[4] *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), *cert. denied*, 117 S. Ct. 1690 (1997).

June of 1997. The plaintiffs submitted a third amended complaint in July of 1997.[5]

In the third amended complaint, the plaintiffs assert that Alaska state law governing primary elections, AS 15.25.010-.130, violates their First and Fourteenth Amendment rights to free political association, free speech, free assembly, and to petition the government for redress of grievances. They bring a similar claim for violation of their rights under the state constitution. Plaintiffs request a declaratory judgment that the political parties have the right to determine how their candidates for the general election are to be selected. They further submit that the State of Alaska may not require a political party to select its candidates for the general election ballot in a blanket primary,[6] should the procedure be objectionable to the party. The RPA, Mr. Ross, and Ms. McKay request a declaratory judgment that the 1998 and future Republican Party primary elections for federal and/or state elective

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[5] Clerk's Docket No. 58.

[6] There are three major types of state primary elections. They are the closed primary, the open primary, and the blanket or non-partisan primary. *O'Callaghan*, 914 P.2d at 1254-55. The closed primary dictates that only members of a given political party may participate in the party's primary election. In an open primary, any voter may vote for candidates for any party's nomination, but the voter may only vote for candidates running for one party's nomination. In a blanket primary, any voter may vote for candidates for the nomination of different political parties for various offices. "Thus, in Alaska's blanket primary a registered Republican might vote for an Alaskan Independence Party candidate for Governor, a Republican for United States House of Representatives, and a Democrat for State Senate." *Id.*

offices be conducted in accordance with Article XIV, Sections (1),[7] (3),[8] and (5)[9] of the Rules of the RPA. All

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[7] Section 1 states:

> Only registered Republicans, registered Independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican party election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

Clerk's Docket No. 58, Third Amended Complaint, Ex. D. This is the rule that was at issue in *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996).

[8] Section 3 states:

> (a) Any voter qualified to vote in the Republican Party primary may vote in that election, regardless of whether or not that voter has voted in the primary election of any other party.
>
> (b) The fact that a voter has voted in the Republican Party primary election shall not disqualify that voter from voting in the primary election of any other political party or parties, where that voter's participation in the primary election of other parties is authorized or permitted by the rules of the other party or parties, or the statutes of the United States or the State of Alaska.

Clerk's Docket No. 58, Third Amended Complaint, Ex. D.

[9] Section 5 states:

> In order to be a candidate in any Republican Party primary election, a person must have been a registered voter of the Republican Party of Alaska for a continuous period of six (6) months immediately prior to the filing deadline for the primary election. The SCC for statewide candidates and the DC for District candidates may by two-thirds (2/3) vote of each organized committee involved, waive this rule for specific candidates when they determine such

plaintiffs request a permanent injunction prohibiting defendants from conducting elections in any manner other than in conformance with the rules of the applicable party. The RPA, Mr. Ross, and Ms. McKay request an injunction requiring the defendants to conduct the 1998 and future Republican primary elections in conformance with Republican party rules. They further request an injunction requiring the defendants to promulgate and file immediately appropriate primary elections regulations with the United States Justice Department.

The merits of plaintiffs' federal civil rights claim are not before the court at the present time. Rather, this order addresses the defendant State of Alaska's motion for partial summary judgment to dismiss plaintiffs' claims on claim preclusion and issue preclusion grounds. Further restricting the court's present inquiry, the court and counsel at a status conference (and confirmed at oral argument on the instant motion) have agreed that the focal point of defendant's motion for partial summary judgment is whether the parties are precluded from relitigating claims and issues regarding Article XIV, Section 1, of the Rules of the Republican Party. As to defendant's motion, the operative facts regarding prior litigation are as follows.

At a convention of the RPA in March 1990, the RPA adopted what is now Article XIV, Section 1 of the party rules, which states:

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action to be in the best interests of the Republican Party.

Clerk's Docket No. 58, Third Amended Complaint, Ex. D.

> Only registered Republicans, registered Independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.[10]

This party rule conflicted with Alaska Statutes, Title 15, Chapter 25, specifically AS 15.25.010. AS 15.25.010 requires:

> Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter.

Under Chapter 25, any person may declare himself or herself a candidate of a party in the primary election upon meeting certain legal requirements. The candidate must be a member of the political party,[11] and registered to vote as a member of the political party under whose name the candidate seeks nomination.[12] Registration to vote as a declared party member, however, can be accomplished on the day of the declaration for candidacy. All primary candidates are listed on a single ballot without

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[10] Clerk's Docket No. 58, Third Amended Complaint, Ex. D.

[11] This means the candidate supports the political program of a party. AS 15.60.010(15).

[12] AS 15.25.030(16).

regard to party affiliation.[13] All eligible voters, without regard to party affiliation, may vote for any candidate. Where there are two or more candidates seeking nomination under a single party's name, the candidate who receives the most votes advances to the general election.[14]

As the RPA rule requiring a partially closed election conflicted with state law, the RPA challenged the constitutionality of state law in a suit filed with the federal district court for the District of Alaska. *Zawacki v. State*, No. A92-0414-CV (JKS). United States District Court Judge Singleton announced in a tentative decision that the state's blanket primary statute infringed upon RPA's rights to freedom of association. Following this announcement, the parties stipulated that "in light of the Court's preliminary conclusion"[15] of unconstitutionality, Lieutenant Governor John B. Coghill would adopt regulations which would provide for two separate ballots for primary elections. One ballot would follow the RPA rule

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[13] AS 15.25.060 states:

> The primary election ballot shall be prepared and distributed by the director in the manner prescribed for general election ballots except as specifically provided otherwise for the primary election. The director shall print the ballot on white paper and place the names of all candidates who have properly filed in groups according to offices filed for, without regard to party affiliation. The order of the placement of the names for each office shall be as provided for the general election ballot. Blank spaces may not be provided on the ballot for the writing or pasting in of names.

[14] AS 15.25.100.

[15] *O'Callaghan v. Coghill*, 888 P.2d 1302, 1303 (Alaska 1995).

and be available only to Republicans and non-partisans; the other was a statutory ballot available to all voters. Before the 1992 primary, the director of elections adopted emergency temporary regulations providing for a separate primary election in the manner just described. Before the 1994 primary elections, the director of elections adopted identical permanent regulations.

Mike O'Callaghan, appearing *pro se*, filed a complaint in state court against Lieutenant Governor Coghill in his official capacity. *O'Callaghan v. Coghill*, 888 P.2d 1302 (Alaska 1995). Mr. O'Callaghan challenged the legality of the 1992 primary on the ground that the emergency, temporary regulations were inconsistent with the governing state statute. Following motion practice, the superior court granted summary judgment in favor of the State and dismissed Mr. O'Callaghan's complaint. The court had found (as the State had argued) that the challenged regulations were valid because they were properly adopted in accordance with a stipulation sanctioned by the federal court. Mr. O'Callaghan appealed this ruling.

On appeal, the Alaska Supreme Court held that the lower court's decision was not supported by law because a stipulation or consent judgment declaring a law unconstitutional is not valid. *O'Callaghan v. Coghill*, 888 P.2d 1302, 1303 (Alaska 1995). The State, as appellee, next argued that the regulations were nevertheless valid because the blanket primary law was clearly unconstitutional. The court, while noting that regulations may be adopted in contravention to a clearly unconstitutional statute, held that the state could not satisfy the clearly unconstitutional standard. *Id.* at 1304-05. Rather than remand the case to the superior court for further action

below, the supreme court decided it would address the ultimate question of the legality of the 1992 and 1994 primary elections. This inquiry required the court to determine whether the blanket primary statute unconstitutionally burdens the RPA's rights to freedom of association. Because the constitutionality of the statute had not been adequately briefed by the parties, the court requested supplemental briefing on this issue. In doing so, it invited the Alaskan Independence Party, the Green Party of Alaska, the Democratic Party of Alaska, the Legislative Affairs Agency, and the RPA to join the case as either an *amicus curiae* or intervenor. All invited parties, as well as any other interested parties, were required to submit opening briefs on the issue of the constitutionality of the state statute simultaneously. Following that submission, all parties were provided the opportunity to reply to opposing parties' opening briefs.

The RPA moved to intervene as a defendant/appellee; that motion was granted. An organization known as Alaskan Voters for an Open Primary ("AVOP") intervened as plaintiff/appellee. The Alaskan Independence Party and the Alaska Federation of Natives participated as *amici curiae*. Shortly after the RPA intervened, the State reversed its position and argued on appeal in favor of the state statute's constitutionality. Based upon this change of position, the RPA filed a notice of removal in federal district court. *O'Callaghan v. State*, No. A95-0087-CV (HRH). The State, AVOP, and O'Callaghan filed motions to remand. The case was remanded to the Alaska

Supreme Court[16] and briefing proceeded on whether the blanket primary law unconstitutionally burdened the right of members of political parties to free association.

The RPA submitted its briefing of this issue to the court. The RPA first requested in its supplemental briefing that this case be remanded to superior court for further fact finding.[17] The RPA next argued that a close scrutiny standard must apply to the state law. Under this standard, the RPA argued that the state statute unconstitutionally limited the party's right, protected by the First and Fourteenth Amendments, to close its primary to voters registered with other parties. It presented its understanding of governing United States Supreme Court precedent on this issue.

AVOP argued in favor of the constitutionality of the state statute. The Alaskan Independence Party, in its submission to the court, adopted by reference the position of AVOP that the state blanket primary law was constitutional. In that submission, counsel for the Alaskan Independence Party stated that it was also the belief of then Lieutenant Governor John Coghill that existing state law governing primary elections should prevail over internal party rules, unless and until state law was amended or repealed.[18]

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[16] Order of June 29, 1995, Clerk's Docket No. 44 in *O'Callaghan v. State*, No. A95-0087-CV (HRH).

[17] The Alaska Supreme Court decided the case notwithstanding the request to remand.

[18] Clerk's Docket No. 61, Ex. 7 at 3.

Following completion of the briefing, the Alaska Supreme Court issued its opinion. It identified the question before the court as follows:

> The question in this case is whether, in light of [the RPA] rule, the blanket primary violates RPA's freedom of association and is thus unconstitutional.

O'Callaghan, 914 P.2d at 1252.

The court reviewed the arguments advanced by the RPA. The RPA had argued that a blanket primary harms its freedom of association in two ways: first, that it encourages raiding;[19] and, second, that it results in the election of candidates that are less accountable to party principles and platforms. The Alaska Supreme Court, in a three-to-one decision, held that the blanket primary law was constitutional. The court employed the following federal standard of review of election laws:

> "[A] more flexible standard applies. A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration, 'the extent to which those interests make it necessary to burden the plaintiff's rights.' . . .

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[19] Raiding is the practice whereby voters in sympathy with one party designate themselves as voters of another party to influence or determine the results of the other party's primary. *O'Callaghan*, 914 P.2d at 1258, n.11.

> "Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subject to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' . . . But when a state election law imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions. . . . "

Id. at 1254 (*quoting Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992) and omitting citations).

The Alaska Supreme Court conducted its analysis pursuant to this standard. The court stated that raiding was a legitimate concern of the RPA, although its effects may be exaggerated. The court next stated that the harm of less accountability was only slightly greater in a blanket primary than it was in the partially closed primary advanced by the RPA rule. The court next balanced the interests of the State against those of the RPA. State interests noted were: (1) encouraging voter turnout; (2) maximizing voters' freedom of choice; (3) and ensuring that elected officials are the voices of the people by forcing the major political parties to have a broad, cross-section of support from the voters. The State argued that these concerns had special importance in a state where most of the voters are non-partisan and undeclared. The court concluded that the State's interests were "legitimate

and important"[20] as well as "reasonable and nondiscriminatory."[21] Employing the flexible standard adopted by the United States Supreme Court in *Burdick*, the court ruled that the State's interests outweighed the harms to the RPA's rights to freedom of association. Thus, the Alaska Supreme court's conclusion was as follows:

> We hold that Alaska's blanket primary statute is constitutional. A state's election statute does not violate the first amendment associational rights of a political party solely by virtue of the fact that the statute conflicts with party rules pertaining to the primary. The blanket primary is nondiscriminatory. While the blanket primary may create some degree of interference with RPA's associational rights, this interference is minor and is justified by the State's interests.
>
> . . . .
>
> We reverse the decision of the superior court granting summary judgment upholding the regulations under which the 1992 primary election was conducted. Having previously rejected the arguments that the challenged regulations should be upheld because of the federal court stipulation or because the blanket primary statute is clearly unconstitutional, we conclude that the blanket primary statute is constitutional and thus the regulations under which the 1992 and 1994 elections were conducted are invalid. A declaratory judgment is entered accordingly.

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[20] *O'Callaghan*, 914 P.2d at 1262-63.

[21] *O'Callaghan*, 914 P.2d at 1263.

> The 1996 primary shall be conducted under the Alaska Statutes.

O'Callaghan v. State, 914 P.2d at 1263-64.

The RPA petitioned the United States Supreme Court for a writ of *certiorari*. That petition states:

> The Alaska Election Code provides for a single "blanket" primary election in which any voter has the right to vote for any candidate, regardless of the party affiliation of the voter or the candidate. The Rules of the [RPA] provide that only registered Republicans, registered independents, and registered voters who state no preference of party affiliation may vote in the Alaska Republican primary election. The Supreme Court of Alaska held (3 to 1) that the Alaska blanket primary statute does not violate the right of the Republican Party of Alaska and its members to free political association guaranteed by the First and Fourteenth Amendments to the United States Constitution.
>
> The questions presented are:
>
> (1) Whether this decision conflicts with prior free political association decisions of this Court such as *Burdick v. Takushi*. . . .
>
> (2) Whether it is a violation of the First Amendment right of free political association for the State of Alaska to require the Republican Party to participate in a blanket primary election, in which registered Democrats and members of other political parties may vote on Republican nominees, as a condition of placing

> Republican candidates on the Alaska general election ballot.[22]

The Court did not grant the RPA's petition. *Certiorari* being denied, the plaintiffs filed a third amended complaint in this case,[23] the content of which is laid out above. The State moves for partial summary judgment to dismiss plaintiffs' complaint on claim preclusion and issue preclusion grounds.

II.

DISCUSSION

A.

Summary Judgment Standard

A party against whom a claim is asserted or declaratory judgment is sought may move for summary judgment in the party's favor as to all or any part of the claim thereof. Fed. R. Civ. P. 56(b). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The facts regarding the present dispute are not contested. The defendant is entitled to partial summary judgment as a matter of law if the elements of claim preclusion or issue preclusion are satisfied.

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[22] Clerk's Docket No. 61, Ex. 6 at 2.

[23] The present case was originally filed with this court in February of 1995; that was about the time the Alaska Supreme Court requested supplemental briefing in the *O'Callaghan* case.

B.

The Preclusive Effect of a
State Court Judgment in Federal Court

The preclusive effects of former litigation are commonly referred to as *res judicata*. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984). To determine the preclusive effect of state court judgment in federal court, this court applies state law. *Hiser v. Franklin*, 94 F.3d 1287, 1290 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1106 (1997). This is because "a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra*, 465 U.S. at 81.

In Alaska, like most every jurisdiction in the United States, the doctrine of *res judicata* includes two preclusive concepts: claim preclusion and issue preclusion. *DeNardo v. Municipality of Anchorage*, 775 P.2d 515, 517 (Alaska 1989). Alaska generally follows the *Restatement (Second) of Judgments* (1982) regarding both doctrines. *See State v. Smith*, 720 P.2d 40, 41 (Alaska 1986); *Tolstrup v. Miller*, 726 P.2d 1304, 1306 (Alaska 1986).

The exceptions to the doctrine of *res judicata* are few. In federal actions, a state court judgment will not be given preclusive effect where: (1) American Indians' civil rights are involved and the determination of the state court as to violation of these rights is transparently erroneous, *Red Fox v. Red Fox*, 564 F.2d 361, 365 (9th Cir. 1977); (2) the party against whom an earlier court decision is asserted did not have a full or fair opportunity to litigate a claim or issue in the first court, *Haring v. Prosise*, 462

U.S. 306, 313 (1983); (3) special circumstances warrant an exception to the normal rules of preclusion, such as where a Section 1983 claimant has not freely and without reservation submitted his federal claims to a state court or where state courts were unable or unwilling to protect federal rights, *id.* at 313-14, n.7; and (4) controlling facts or legal principles have changed significantly since the state court judgment, *id.* at 313 n.7.

Barring these exceptions, Alaska rules of *res judicata* will apply to the current dispute.

C.

Claim Preclusion

Under Alaska law, the elements of claim preclusion are as follows:

> [Claim preclusion] bars the relitigation of the same claim between the same parties and their privies when (1) a court of competent jurisdiction, (2) has rendered final judgment on the merits, and (3) the same cause of action and same parties or their privies were involved in both suits.

DeNardo, 775 P.2d at 517.

The question before the court is whether plaintiffs' current claim under 42 U.S.C. § 1983 for violation of their federal civil rights is precluded by the Alaska state court's adjudication of the *O'Callaghan* matter. It is not in dispute that a court of competent jurisdiction has found in favor of Mr. O'Callaghan on his claim that the 1992 and

1994 primaries (which were conducted according to Article XIV, Section 1, of the RPA rules) were conducted illegally.[24] It is contested whether both suits involve the same claim and the same parties or their privies.

1. *Same Claims – RPA, Mr. Ross, and Ms. McKay.* Under Alaska law, final judgment on the merits in the first action "extinguishes all claims 'with respect to all or any part of the transaction or series of connected transactions' out of which the previous action arose." *Tolstrup*, 726 P.2d at 1306 (*quoting Restatement (Second) of Judgments* § 24). The determination of whether the same claims are at issue in both lawsuits requires an inquiry into the facts alleged.[25]

In addition to foreclosing claims actually raised in the prior litigation, claim preclusion bars a second suit when the claim should have been decided in the first suit because it also arose out of the same transaction or series of transactions. *Restatement (Second) of Judgments* § 24. This precept applies to bar compulsory counterclaims that should and could have been raised in the first suit, but were not. *Restatement (Second) of Judgments* § 22.

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[24] *O'Callaghan*, 914 P.2d at 1263.

[25] According to *Restatement (Second) of Judgments* § 24(2):

> What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Mr. O'Callaghan's claim serves as the basis of comparison. His claim that the 1992 and 1994 primaries were conducted illegally arose from the State's participation and stipulation to the *Zawacki v. State* settlement. This is because that settlement led to the State promulgating regulations that were in contravention to the blanket primary statute. The heart of Mr. O'Callaghan's claim was that the State had no authority to issue regulations in contravention to guiding state statute.

The RPA's, Mr. Ross's, and Ms. McKay's claim in the current suit is that the State is violating their civil rights so long as the State refuses to conduct primary elections in accordance with party rules, Article XIV, Sections 1, 3, and 5, of the RPA. As to this matter, the RPA adopted Section 1 in March 1990. The State would no longer enforce that rule following the Alaska Supreme Court's decision in *O'Callaghan* in April 1996 that it was illegal to do so pursuant to state regulations when statutory law provided to the contrary. The 1996 primary election was conducted pursuant to state statute and in contravention to the Republican party rule.

It is not disputed that Article XIV, Section 1, of the RPA party rules is involved in both suits. Mr. O'Callaghan's suit arose from the State's implementation of that rule. The RPA's, Mr. Ross's and Ms. McKay's suit in part arises from the State's decision (one required by the Alaska Supreme Court) to no longer enforce that rule. It could even be said that the action out of which both suits arose was the RPA's authorization of this party rule. These claims share a common root in that both claims could and probably should have been raised in the same action. That is, if the RPA was named as a party to defend

the State's implementation of this party rule, the RPA should have raised as a counterclaim the contention that it would be a violation of federal civil rights for the State to restrict their freedom of association. Thus, the claims as to the legality of the partially closed election are the same here.

There is one fundamental reason why claim preclusion should not apply as to Article XIV, Section 1 of the RPA rules: the RPA never had an opportunity to raise this counterclaim. The RPA was not an original defendant to the *O'Callaghan* suit. The RPA intervened as a defendant after the case was appealed to the Alaska Supreme Court, and the sole issue the RPA was allowed to brief was the constitutionality of Alaska's blanket primary statute. The RPA's request to remand the matter to superior court for further action – including, perhaps, presenting a counterclaim – was in effect denied.[26] Claim preclusion is not a barrier to a party bringing a second suit when that party was not allowed to raise its claim in the first suit.[27]

2. *Same claims – The Remaining Parties.* At the present time, the Alaskan Independence Party, Mr. Coghill, and the Libertarian Party of Alaska simply express their belief that the State has no authority to dictate how party candidates for the general election are to be selected.

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[26] The Alaska Supreme Court did not address this request.

[27] The present claims of the RPA, Mr. Ross, and Ms. McKay as to Sections 3 and 5, Article XIV, of the RPA party rules are not barred by the doctrine of claim preclusion because they also could not have been asserted in *O'Callaghan*.

According to the third amended complaint, the Libertarian Party "opposes the primary election as a concept."[28] It has submitted no rules to the State; nor has any request for State enforcement of party rules been denied. Thus, it is difficult to determine what transactional facts are the root of the Libertarian Party's claim. Its claim, if any, arises out of the State's decision to enforce the statutes requiring a primary election.

The Alaskan Independence Party and Mr. Coghill do not allege that they oppose the primary election as a concept. Indeed they sided with AVOP and the State in *O'Callaghan* on appeal. Rather, the party desires to "have the right of self-control over the nomination of its candidates, and specifically desires to retain and protect the right to nominate its candidates by convention, if it desires to do so."[29] The Alaskan Independence Party has submitted no rules to the State which have been denied. Thus, it is again difficult to determine what transactional facts are the basis of the party's and Mr. Coghill's claim. Their claim, if any, also arises out of the State's decision to enforce the laws governing primary elections. The Alaskan Independence Party, the Alaska Libertarian Party, and Mr. Coghill, like the RPA, did not have an opportunity to present their affirmative claim, if any, in *O'Callaghan*.

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[28] Clerk's Docket No. 58, Third Amended Complaint at ¶ 4.

[29] Clerk's Docket No. 58, Third Amended Complaint at ¶ 5.

3. *Conclusion.* Claim preclusion does not bar the plaintiffs' third amended complaint.[30] Having reached this conclusion, it is unnecessary to evaluate the same parties or their privies issue as to any of the plaintiffs as to claim preclusion.

D.

Issue Preclusion

Under Alaska law:

> [I]ssue preclusion bars the relitigation of an issue where: (1) the party against whom the preclusion is employed was a party to or in privity with a party to the first action; (2) the issue precluded from relitigation is identical to the issue decided in the first action; (3) the issue was resolved in the first action by a final judgment on the merits; and (4) the determination of the issue was essential to the final judgment.

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[30] However, there may be another bar to the Alaska Libertarian Party's, the Alaskan Independence Party's, and Mr. Coghill's suit, which is not the subject of the current motion, and that is the issue of ripeness. That is, it is difficult to see how the State has violated these remaining plaintiffs' constitutional rights if these parties have not adopted rules in contravention to the blanket primary system or the primary system in general and submitted the rules to the State for approval. As stated at the conclusion of oral argument, the court wishes to revise the previously agreed-upon briefing arrangements to include an initial motion of the defendants on the question of whether a case or controversy is presented in the Third Amended Complaint of the Alaska Libertarian Party, the Alaskan Independence Party, and Mr. Coghill.

Jackinsky v. Jackinsky, 894 P.2d 650, 654 (Alaska 1995) (citation omitted).[31]

The first element of issue preclusion is the requirement that both suits involve the same parties or their privies. There is no unified definition of privity. *Alaska Foods, Inc. v. Nichiro Gyogyo Kaisha, Ltd.*, 768 P.2d 117, 121 (Alaska 1989). It is instead "a shorthand way of expressing assurance that the non-party has had an adequate notice and opportunity to be heard, and that its rights and interests have been protected." *Id.* In addition, the Alaska Supreme Court adopts the approach to the subject of privity taken in the *Restatement (Second) of Judgments*. *Id.; see Restatement (Second) of Judgments* §§ 34-61. There, the focus of the inquiry is upon the relation of the present party to the parties in the prior lawsuit. Principles of due process remain paramount in this analysis.

The second element of issue preclusion is the requirement that identical issues be decided in both suits. Section 27 of the *Restatement (Second) of Judgments* reiterates the general rule and further addresses the kinds of issues subject to issue preclusion:

> When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to

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[31] Section 17(3) of the *Restatement (Second) of Judgments* similarly states:

> A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment. . . .

> the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

Restatement (Second) § 27.[32] The text of and comments to Section 27 make clear that issue preclusion bars relitigation of issues of law as well as fact. *Eilrich v. Remas*, 839 F.2d 630, 634 n.2 (9th Cir. 1988). This is a change from the *Restatement (First) of Judgments*, which distinguished between questions of law and questions of fact. *Id.* However, application of issue preclusion to a pure issue of law is less favored than a mixed question of law and fact, especially when the issue is one of statutory construction and the two actions are substantially unrelated. *Restatement (Second) of Judgments*, § 28 cmt. b.

As to the third element of issue preclusion, final judgment includes any prior adjudication of an issue that is determined to be sufficiently firm to be accorded conclusive effect. *Usibelli Coal Mine, Inc. v. State*, 921 P.2d 1134, 1142 (Alaska 1996). An issue was decided in a prior action so long as the issue was "properly raised, by the pleadings or otherwise . . . submitted for determination, and . . . determined. . . . " *Restatement (Second) of Judgments*, § 27 cmt. d.

The final element of issue preclusion requires a determination of whether an issue is essential to a final judgment. The *Restatement (Second) of Judgments* offers guidance to this question:

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[32] *See also* comment c to *Restatement (Second) of Judgments* § 27.

> The appropriate question . . . is whether the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception under § 28[33] – for example, that the significance of the issue for purposes of the subsequent action was not sufficiently foreseeable at the time of the first action.

Restatement (Second) of Judgments § 27 cmt. j.

The question before the court is whether any of the current plaintiffs are precluded from relitigating those issues resolved in *O'Callaghan v. State*. The court addresses each element of issue preclusion in turn.

1. *Same Parties or Their Privies.* It is not contested that the State and the RPA were parties to both lawsuits. Plaintiffs also concede that Mr. Ross, as a national committeeman of the RPA, was in privity with the RPA.[34] The status of the Alaskan Independence Party and Mr. Coghill is contested; this is the case even though the political party was *amicus curiae* to the original suit and Mr. Coghill was a named defendant, sued in his official capacity as Lieutenant Governor. The status of Ms. McKay and the Libertarian Party of Alaska is also contested.

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[33] Section 28 lists exceptions to the general rule of issue preclusion similar to those discussed at page 16, *supra*.

[34] Clerk's Docket No. 65, Opposition Memorandum at 15.

(a) *Ms. McKay.* Analysis begins with Ms. McKay, who is the only remaining party who expresses the position of the RPA whose privity with the RPA in the *O'Callaghan* suit is not conceded. In the third amended complaint, Ms. McKay identifies herself as a registered Republican voter in the State of Alaska who objects to members of political parties other than the Republican Party participating in choosing Republican Party candidates for public office. Ms. McKay further believes that the candidate selection process should be conducted in accord with the rules of her party.[35] She requests the same relief as that requested by the RPA and she makes the same objections to the constitutionality of the blanket primary as those advanced by the RPA in the *O'Callaghan* suit.

At issue is whether Ms. McKay's "rights and interests have been protected," *Alaska Foods, Inc.*, 768 P. 2d at 121, by the RPA in the *O'Callaghan* suit. To address this question, this court applies the relational approach to this subject set forth in the *Restatement (Second) of Judgments.* The *Restatement* does not specifically address whether claims of voluntary organizations should bar subsequent litigation of the same issues by the organization's members.[36] However, building upon the relational approach

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[35] Clerk's Docket No. 57, Third Amended Complaint at ¶ 7.

[36] The *Restatement* addresses whether members of a corporation or unincorporated association are bound by earlier judgments in cases in which the corporation or association were parties. *See Restatement (Second) of Judgments* §§ 59 and 61. However, these sections are not applicable to the question of whether members of political parties are bound to judgments against the political party on the same issue or claim.

taken to the subject of privity in both the *Restatement* and by the Alaska courts, *Moore's Federal Practice* offers the following guidance on this question, which this court will apply:

> A voluntary membership organization, such as a trade association, labor union, social or political organization, or similar formally organized group has standing to bring suit on behalf of its members when its members could otherwise sue in their own right, the interests to be protected or asserted are germane to the organization's purpose, and individual members of the organization are not indispensable parties to the action. The capacity in which such organization appears in an action must be clearly understood to determine the preclusive effect of any resulting judgment. An organization may appear in an action to promote or defend its own organizational interests, the members of the organization may be represented by a party to a class action, or an organization may bring or defend an action on behalf of its members.

18 James Wm. Moore, *Moore's Federal Practice*, § 131.40 [3] [e] [iv] (3d ed. 1997) (footnotes omitted).[37] A person whose representative suffered a defeat in a prior action cannot pursue another action on his or her own behalf. *Id.*, § 131.40[3][e][1][C]. However:

> As with other types of actions involving representatives of nonparties, the preclusive

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[37] *Moore's Federal Practice* § 132.04 [1] [b] (3d ed. 1997), states that the discussion regarding privity in section 131 (the section on claim preclusion) is applicable to issue preclusion as well.

> effect of any judgment must be determined by considering the interests asserted or protected by the organization. Because representative actions such as these lack the due process safeguards that are built into federal and most state class action procedures, close scrutiny should be given to the ability of the organization to truly represent the interests of its members, and if it was an inadequate representative of some or all of its members, the preclusive effect of the resulting judgment will be reduced or eliminated accordingly.

Id., § 131.40 [3] [e] [iv]

In *O'Callaghan,* the RPA sued to protect the First Amendment rights of its members. The interests which Ms. McKay now attempts to protect (her First Amendment rights) are the same interests which her political party attempted to protect on her behalf in the earlier lawsuit. There is no evidence presented that the RPA did not vigorously advocate on the behalf of its members in the *O'Callaghan* suit or that Ms. McKay's interests in any way deviate from those interests which the RPA attempted to protect. Applying the close scrutiny required to assure that Ms. McKay's due process rights have been protected, this court finds that Ms. McKay was in privity with the RPA in the *O'Callaghan* suit. Any conclusion reached as to whether the RPA is precluded from relitigating issues in this suit is equally applicable to her.[38]

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[38] This conclusion would apply to Mr. Ross as well if he had not conceded privity.

(b) *The Alaska Independence Party and Mr. Coghill.* Next to be addressed is whether the Alaskan Independence Party and Mr. Coghill were parties or in privity with any named party to the *O'Callaghan* suit. The question is interesting because both the Alaskan Independence Party and Mr. Coghill have changed their positions from those they held at the time of the *O'Callaghan* suit. The Alaskan Independence Party entered the *O'Callaghan* suit as *amicus curiae.* It aligned itself with AVOP by adopting by reference AVOP's briefing on the constitutionality of the blanket primary statute. The State argues that privity should be found as to the Alaskan Independence Party and its member, Mr. Coghill, because: (1) the Alaskan Independence Party had fair notice of the *O'Callaghan* proceedings and an opportunity to be heard; (2) the Alaskan Independence Party was in fact heard when it adopted by reference the position of AVOP; and (3) AVOP adequately represented the Alaskan Independence Party's interests in preserving the blanket primary system.

Unfortunately, neither the *Restatement (Second) of Judgments* nor *Moore's Federal Practice* addresses the question of whether an organization, appearing as *amicus,* which adopts the position and the briefing of a named party, is in privity with the named party. The fundamental question here is whether the Alaskan Independence Party would be accorded due process if it is held to have been in privity with AVOP. This party's due process rights are at risk because the Alaskan Independence Party has completely reversed its position on the constitutionality of the blanket primary system since the *O'Callaghan* decision. There is a serious question of whether

this change of position is nevertheless too late or irrelevant to the privity issue, because the Alaskan Independence Party was in fact accorded due process as to its original position on the constitutionality of the state statute.

In the absence of any clear authority, the court holds that an *amicus* party is not a privy for purposes of issue preclusion. Mr. Coghill is not considered a party or a privy to the first lawsuit for the further reason that he is now suing in his individual capacity. Section 39 of the *Restatement (Second) of Judgments*[39] forecloses binding a party suing in one capacity from a judgment against him when he was sued in another capacity.

(c) *The Alaska Libertarian Party.* The last party to be addressed is the Libertarian Party of Alaska. The State asserts that the Libertarian Party should be considered in privity with the RPA. The State makes the argument that because the Libertarian Party had constructive notice of its ability to intervene in the *O'Callaghan* suit[40] and because its position was adequately represented by the RPA, it should be considered in privity with the RPA. The State's arguments underemphasize due process concerns

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[39] Section 36 of the *Restatement (Second) of Judgments* states in pertinent part:

> (2) A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.

[40] Unlike the recognized political parties in Alaska, the Libertarian party was not invited to participate in the prior lawsuit.

that play a paramount role in the privity analysis. The Libertarian Party is not bound by the *O'Callaghan* judgment on issue preclusion grounds simply because it may have had an opportunity to be heard in the prior lawsuit.

(d) *Conclusion as to Privity.* Mr. Ross and Ms. McKay are in privity with the RPA. The Alaskan Independence Party, Mr. Coghill, and the Libertarian Party of Alaska are not in privity with named parties in the *O'Callaghan* suit. The remaining discussion of issue preclusion implicates only the RPA, Mr. Ross, and Ms. McKay.

2. *Identical Issues.* In *O'Callaghan v. State,* the Alaska Supreme Court resolved the following issues.

> (1) Whether Alaska's blanket primary law is *per se* unconstitutional when it conflicts with party rules regarding the selection of political parties.

The court held that governing Supreme Court precedent does not confer *per se* validity on party rules which conflict with a state's primary election laws.

> (2) Whether the State's interests justify restrictions on the RPA's right under the freedom of association clause of the First Amendment to hold a partially closed primary (another way to phrase this issue is whether the blanket primary violates the RPA's right to freedom of association and is therefore unconstitutional).

The court addressed whether the RPA's rights to freedom of association were being impaired by the blanket primary. It analyzed the rights identified by the RPA as being at issue. These were the RPA's right to protect itself against raiding and to elect candidates who are

more accountable to Republican party principles and platforms. The court concluded that raiding was a legitimate concern of the RPA, even if its effects may be exaggerated. The court also concluded that the damage to the RPA's interest in accountability was not substantially greater in a blanket primary than it was in the partially closed election that the RPA proposed. After identifying RPA interests, the court turned to the State's interests in promoting a blanket primary. Those were: (1) to encourage voter turnout; (2) maximize a voter's freedom of choice; and (3) to ensure that elected officials have relatively broad-based constituencies. The court concluded that these state interests were especially important in a state where the majority of voters were non-partisan or undeclared. The court stated that the state interests were legitimate and important. It concluded that restrictions placed upon the RPA (and, by analogy, all political parties) in order to advance these interests were reasonable and nondiscriminatory. The court stated that the interests of the state outweighed the harms imposed on the RPA's rights to freedom of association; it noted that the harm imposed on the RPA's rights was minor. Finally, the court held that Alaska's blanket primary statute was constitutional.

> (3) Whether the state regulations – drawn up to be in accord with RPA party rule, Article XIV, Section 1 – which governed the 1992 and 1994 primary elections, were valid.

The court concluded that because the blanket primary statute was constitutional, the regulations under which the 1992 and 1994 elections were held were invalid.

The following issues are in question in the current lawsuit.

> (1) Whether Alaska's primary laws are *per se* unconstitutional if they conflict with the rules of the political parties.
>
> (2) Whether Alaska's primary election law violates the First and Fourteenth Amendments because it denies the plaintiffs their rights to free association, political expression, assembly, and to petition the government for redress of grievances.
>
> (3) Whether Alaska's primary election law violates the state constitution under clauses similar to the First Amendment of the United States Constitution.
>
> (4) Whether the State of Alaska must alter its primary election laws to conform with Article XIV, Sections 1, 3, and 5 of the rules of the RPA.

Issue (1) was addressed and resolved by the Alaska Supreme Court in *O'Callaghan*. Issue (2) was addressed and resolved on the question of whether Alaska's blanket primary statute violated the plaintiffs' First and Fourteenth Amendment rights. Issue (3) was not specifically addressed, but when the Alaska Supreme Court declared the blanket primary constitutional, a question arises as to whether analysis of the question of constitutionality under the federal constitution necessarily guides analysis under the state constitution. Issue (4) was addressed in part. The Alaska Supreme Court held that the blanket primary laws of the state shall be enforced because state interests promoted by the blanket primary outweigh the interests offered by the RPA for requiring a partially

closed primary. Thus, whether the State must enforce Article XIV, Section 1, of the RPA rules was at issue and resolved.[41]

3. *Final Judgment on the Merits.* Final judgment on the merits includes any prior adjudication of an issue that is determined to be sufficiently firm to be accorded conclusive effect. *Usibelli Coal Mine,* 921 P.2d at 1142. An issue is decided so long as the issue was "properly raised, by the pleadings or otherwise . . . submitted for determination, and . . . determined." *Restatement (Second) of Judgments,* § 27 cmt. d. There was a final judgment on the merits in the *O'Callaghan* suit. All the issues set forth above were properly raised, submitted for determination, and determined. Furthermore, the United States Supreme Court denied the RPA's petition for *certiorari,* thereby assuring the finality of the *O'Callaghan* judgment.

4. *Essential to the Judgment.* An issue is essential to a final judgment when the issue was actually recognized by the parties as important and by the trier as necessary to the first judgment. *Restatement (Second) of Judgments* § 27 cmt. j. All the issues that were resolved by the Alaska Supreme Court in the *O'Callaghan* suit, as set forth above, were essential to the final judgment that the regulations under which the 1992 and 1994 primary elections were conducted were invalid. That is, the court necessarily addressed the RPA's assertion that an election law that conflicts with party rules was *per se* invalid. The court was also required to address whether the State's interests

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[41] Article XIV, Section 3 (maximize voter participation), of the rules was not addressed; section 5 (prior registration requirement) of the rules was not addressed.

in promoting a blanket primary outweighed the harms to the RPA's rights protected by the First Amendment. To that end, the court was required to address the constitutionality of the blanket primary law. No alternative resolutions to the questions before the court were offered or addressed. All resolved issues were therefore essential to the judgment.

5. *Conclusion.* There are no disputed facts as to the foregoing. As a matter of state law, the RPA, Mr. Ross, and Ms. McKay are precluded from relitigating the issues of whether: (1) Alaska's primary laws are *per se* unconstitutional if the laws conflict with the rules of the political parties; (2) whether Alaska's blanket primary requirement violates the plaintiffs' First and Fourteenth Amendment rights; and (3) whether the State of Alaska must alter its primary election laws to conform with Article XIV, Section 1, of the rules of the RPA. Privity being absent as to Mr. Coghill, the Alaskan Independence Party, and the Libertarian Party of Alaska, they are not barred from litigating the issues resolved by the Alaska Supreme Court.

E.

Exceptions to Giving Preclusive Effect to a Prior State Court Judgment on a Federal Claim

As noted above, "a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra*, 465 U.S. at 81. Under principles of comity and an understanding of concurrent jurisdiction, this is the rule even when the state has

resolved a matter of federal law. Plaintiffs argue that the present dispute falls under the exceptions discussed at page 16 of this order, *supra*.

Plaintiffs first request this court to apply *Red Fox v. Red Fox*, 564 F.2d 361, 365 (9th Cir. 1977), and refuse to give preclusive effect to the *O'Callaghan* judgment because the Alaska Supreme Court's holding was transparently erroneous. In particular, but not as a limitation, the plaintiffs assert it was a clear error for the Alaska Supreme Court to apply less than a strict scrutiny standard.

The Ninth Circuit adopted a "transparently erroneous" exception to claim and issue preclusion in *Red Fox* only because the civil rights of American Indians were at stake.[42] Plaintiffs do not enjoy the favored status of

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[42] The Ninth Circuit stated:

> The relationship between the federal government and the American Indian is like that between a guardian and his ward, thereby placing the Indian in a peculiar and protected status. We view the enactment of the American Indian Civil Rights Act as evidence of this continuing congressional solicitude for the welfare of the American Indian. The courts of the United States must be correspondingly more available to adjudicate, enforce, and protect the civil rights specifically granted to the Indian peoples by the Congress. Consequently, if a state court determination of a claim under the Indian Civil Rights Act is transparently erroneous, the District Court, in order to prevent a miscarriage of justice, need not accord full adjudicatory effect to the state court decision.

Red Fox, 564 F.2d at 365 (citations and footnotes omitted); *see also id.* at n.4 (where the Ninth Circuit states that "[w]e do not hold

Indian tribes. Nevertheless, based on this court's review of the *O'Callaghan* opinion, there is no appearance that the Alaska Supreme Court was transparently in error in any of its rulings, including the application of a standard of review more flexible than strict scrutiny.

Plaintiffs next assert that the state court's judgment in *O'Callaghan* should not be given preclusive effect because they were denied a full and fair hearing of their claims. Plaintiffs who participated in the *O'Callaghan* suit remind the court that they entered the earlier case only after it reached the appellate court level, upon the invitation of the Alaska Supreme Court. Attempts to remand the case to the superior court level were denied. At oral argument, plaintiffs seemed to contend that the balancing approach taken by the Alaska Supreme Court as to the right of association was an unexpected surprise which they could not have anticipated and did not brief. Plaintiffs assert that, based upon the principles of due process noted in *Haring v. Prosise*, 462 U.S. 306, 313 (1983), full adjudicatory effect should not be given to the Alaska Supreme Court's judgment in *O'Callaghan*.

As discussed above, the court is of the view that the RPA was denied the opportunity to raise a claim for violation of its civil rights in the *O'Callaghan* suit. Thus, as discussed above, the earlier judgment should not be given *claim* preclusive effect.

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that the District Court is required to protect a federal forum for *de novo* relitigation in every case. But we believe that the undeniable policy of the Government toward the Indians requires that the courts of the United States must ever be available at the trial level to prevent miscarriages of justice.").

This conclusion, however, is not applicable to whether *issue* preclusion applies. The RPA and all participants in the *O'Callaghan* suit were given a full and fair opportunity to resolve the key question of whether the blanket primary statute was constitutional. The parties were given the opportunity to intervene as parties and to submit opening and reply briefs. The Alaska Supreme Court analyzed the arguments made by the RPA and all other parties. The issue before the court was a mixed question of law and fact, and the Alaska Supreme Court conducted a thorough analysis of the question. The fact contentions of the RPA (the claims of raiding and loss of party accountability) were accepted by the Alaska Supreme Court as detriments to plaintiffs' right of association. The dispute was not as to the facts, but rather the weighing of the competing interests. The balancing approach to the right of association taken by the majority of the Alaska Supreme Court was not what plaintiffs argued for, but it was no unfair surprise. *Burdick v. Takushi*, 504 U.S. 428 (1992), which supplied the standard of review, was an election law case and must have been well known to the plaintiffs when *O'Callaghan* was being briefed.[43] Finally, even after losing at the state supreme court level, the RPA petitioned the United States Supreme Court to review the state court decision. The RPA identified the errors which it believed the Alaska Supreme

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[43] The direct mention of *Burdick* in the RPA's petition for writ of *certiorari*, quoted above, evidences that the RPA knew of the case. *See*, Clerk's Docket No. 61, Ex. 6 at 2. *Burdick* was decided long before *O'Callaghan* was briefed to the Alaska Supreme Court.

Court had made. The Court denied the petition for *certiorari.*

The RPA and its privies were not deprived of a full and fair opportunity to adjudicate issues regarding the constitutionality of Alaska's blanket primary law. The *Haring*[44] exception is inapplicable to the issues fully and fairly resolved by the Alaska Supreme Court. The RPA, Mr. Ross, and Ms. McKay seek here that which the doctrine of issue preclusion is intended to prevent: an opportunity to reargue the issues resolved in state court. The RPA chose to intervene in *O'Callaghan* rather than pursue its case here. Issues were submitted to the Alaska Supreme Court for determination and they were determined. The RPA has already sought review of those issues before the United States Supreme Court and that relief was denied. Out of principles of comity, the state court judgment as to these issues will be given effect as to the RPA, Mr. Ross, and Ms. McKay.

Plaintiffs next assert that they did not submit the issues regarding the constitutionality of the blanket and primary statute freely and without reservation. This exception was also recognized by the United States Supreme Court in *Haring.*[45] The RPA asserts this exception should apply because it had no choice but to adjudicate these issues before the Alaska Supreme Court.

The RPA did have other choices. For example, it could have followed the tactic of the Alaskan Independence Party and participated as *amicus curiae.* As already

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[44] *Haring v. Prosise,* 462 U.S. 306 (1983).

[45] *Id.* at 313-14, n.7.

observed, this case was commenced at about the same time as briefing was being filed with the Alaska Supreme Court. The RPA could have, as it now does, sought an expedited hearing in this court. The RPA was free to decline participation in *O'Callaghan.*

Plaintiffs next assert that preclusive effect should not be given to *O'Callaghan,* because the Alaska Supreme Court was unable or unwilling to protect the current plaintiffs' federal rights. Again, *Haring* [46]notes this exception. There is no evidence that the Alaska Supreme Court was unable or unwilling to protect the current plaintiffs', specifically the RPA's, federal rights. The court made a thorough review of constitutional law governing First Amendment jurisprudence. While the plaintiffs disagree with the court's conclusion, this disagreement alone does not support a finding that the state courts were unwilling or unable to protect plaintiffs' federal civil rights.

Finally, plaintiffs assert that controlling facts have changed significantly since the state court judgment so that O'Callaghan should not be given preclusive effect.[47] Those facts are:

> (1) The Republican Party of the United States has adopted the following rule:
>
> Rule 34(f) – On or after January 1, 1997, no state law or party rule shall be observed that allows persons who have participated or are participating in the selection of any nominee of a party other than the Republican Party, including, but not limited to, through the use of a multi-party

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[46] *Id.* at 314.

[47] *Haring,* 462 U.S. at 313, n.7, again, states this exception.

> primary or similar type ballot, to participate in the selection of a nominee of the Republican Party for that general election. No person nominated in violation of this rule shall be recognized as the nominee of the Republican Party. If state law or state party rule provides for the selection of the nominee of the Republican Party in violation of this rule, the Republican nominee shall be selected by a convention convened and held under the provisions of Rule No. 32 (c), *unless a state party rule provides specifically to the contrary.*[48]
>
> The RPA asserts this rule will prevent any Republican candidate from being placed on the general election ballot for the 1998 and future elections.
>
> (2) The RPA is concerned that Democratic voters may cross-over in the gubernatorial election and vote for a weak Republican adversary to current Governor Knowles.
>
> (3) The Alaskan Independence Party and the Libertarian Party assert that new issues are presented affecting them now that Alaska state law has been amended to allow them to remain ballot qualified without running a candidate for governor.

As to issue (1), plaintiffs assert that the new, national Republican party rule makes it unfair to give preclusive effect to the *O'Callaghan* judgment. The national rule contains an exception for contrary state rules. Thus, if "a state party rule provides specifically to the contrary," the

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[48] Clerk's Docket No. 58, Third Amended Complaint at 8, ¶ 17 (emphasis added).

doomsday consequence which the RPA asserts is present falls away. Second, plaintiffs cite no authority to establish the proposition that a national party rule trumps state law governing state primary elections. It should perhaps have hierarchical effect when the party determines how to select delegates to the national convention,[49] but not here. Third, and perhaps most important, it is necessary to determine whether this rule requires the balancing of a new interest of the RPA that was not advanced or discussed in the *O'Callaghan* opinion. The Alaska Supreme Court identified two interests of the RPA that were potentially hindered by the blanket primary system. These were the effect of raiding and reducing party accountability. The new party rule (which the RPA wrongly argues it cannot escape) furthers both interests. The RPA does not identify a new or different interest now at issue. Even if there were a new issue, because the RPA remains in control due to the exception under the new rule, it cannot assert that new forces are brought to bear on the party's associational rights.

As to issue (2), political raiding was addressed in the *O'Callaghan* suit. The fact that raiding may occur in future elections does not evidence a change of controlling facts.

As to issue (3), the argument of new and controlling facts as to the Alaskan Independence Party, Mr. Coghill, and the Libertarian Party of Alaska is unnecessary now that this court has ruled that these parties' suit is not barred by the doctrines of claim and issue preclusion.

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[49] *See, e.g., Cousins v. Wigoda*, 419 U.S. 477 (1975) (stating that a political party, not a state, has the right to decide who will be a delegate at a party's national convention).

III.

CONCLUSION

Defendant's motion for partial summary judgment is denied in part and granted in part. The doctrine of claim preclusion does not defeat any of the plaintiffs' claims for violation of their civil rights. As to the impact of the doctrine of issue preclusion, the RPA, Mr. Ross, and Ms. McKay are precluded from relitigating the issues of whether:

> (1) Alaska's primary laws are *per se* unconstitutional if the laws conflict with the rules of the political parties;
>
> (2) whether Alaska's blanket primary requirement violates these plaintiffs' First and Fourteenth Amendment rights; and
>
> (3) whether the State of Alaska must alter its primary election laws to conform with Article XIV, Section 1 of the rules of the RPA.

The doctrine of issue preclusion does not bar the Alaskan Independence Party's, Mr. Coghill's, or the Libertarian Party of Alaska's suit.

DATED at Anchorage, Alaska, this 10 day of February, 1998.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WAYNE ANTHONY ROSS, et al., Plaintiffs,	)	
vs.	)	No. A95-0053-CV (HRH)
STATE OF ALASKA, et al., Defendants.	)	

(Filed Apr. 03, 1998)

ORDER

Motion to Dismiss

The defendants move to dismiss certain plaintiffs' suit for violation of their federal civil rights.[1] Defendants also move for reconsideration of this court's order of February 10, 1998.[2] These motions are opposed.[3] Oral argument is not requested.

FACTS

Pertinent to the present motion, the moving plaintiffs are the Libertarian Party of Alaska, the Alaskan Independence Party, and John B. Coghill. Defendants are the State

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[1] Clerk's Docket No. 76.

[2] *Id.*

[3] Clerk's Docket No. 82.

of Alaska, the State of Alaska Division of Elections, Lieutenant Governor Fran Ulmer in her official capacity as Supervisor of Elections, and Sandra J. Stout in her official capacity as Director of the Division of Elections. Defendants will be referred to collectively as the "State".

In the third amended complaint[4] that is the subject of this motion, the above plaintiffs, the Republican Party of Alaska, and members of that political party[5] bring a 42 U.S.C. § 1983 claim, asserting that Alaska state law governing primary elections, AS 15.25.010-.130, violates their First and Fourteenth Amendment rights to free political association, free speech, free assembly, and to petition the government for redress of grievances. Pursuant to 28 U.S.C. § 2201, all plaintiffs request a declaratory judgment that the political parties have the right to determine how their candidates for the general election are to be selected. They further request a declaration that the State may not require a political party to select its candidates for the general election ballot in a blanket primary, should the procedure be objectionable to the party. All plaintiffs request a permanent injunction prohibiting the State from conducting elections in any manner other than in conformance with rules of the applicable political party.

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[4] Clerk's Docket No. 58.

[5] The Republican plaintiffs were held to be barred by the doctrine of issue preclusion from relitigating here the question of whether the Alaska blanket primary law violated these plaintiffs' First and Fourteenth Amendment rights. Order of Feb. 10, 1998, at 38, Clerk's Docket No. 72.

In the third amended complaint, the Alaskan Independence Party alleges its desire to control and select candidates by convention, should it desire to do so.[6] It notes that it cannot do so under the present state law.[7] Plaintiff John B. Coghill alleges that, as a member of the Alaskan Independence Party, he desires to select candidates for his party in the manner that his party deems appropriate.[8] Mark Chryson, pursuant to this court's order of March 9, 1998,[9] has been substituted as plaintiff to replace Mr. Coghill. No allegation is made that the Alaskan Independence Party has adopted a candidate nomination process in contravention to state law. Nor is an allegation made that it has requested the state or federal government to implement the same.

The Libertarian Party of Alaska states that it opposes the primary election system as a concept and desires that each party have the right of self-control over the nomination of its candidates.[10] The Libertarian Party states it is presently being harmed because the State mandates a blanket primary election, thereby depriving the party of its right to control its own candidate selection process.[11] The third amended complaint does not state how the Libertarian Party would desire to select its political candidates; nor does it state that the Libertarian Party has

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[6] Third Amended Complaint at ¶ 5, Clerk's Docket No. 58.

[7] *Id.*

[8] *Id.* at ¶ 6.

[9] Clerk's Docket No. 75.

[10] Third Amended Complaint at 4, Clerk's Docket No. 58.

[11] *Id.*

requested any action on the part of the state or federal government to implement the same.

The court's order of February 10, 1998,[12] which addressed the State's motion for summary judgment on claim and issue preclusion grounds, stated as to these plaintiffs' claims:

> [T]here may be [a] bar to the Alaska Libertarian Party's, the Alaskan Independence Party's, and Mr. Coghill's suit, which is not the subject of the current motion, and that is the issue of ripeness. That is, it is difficult to see how the State has violated these remaining plaintiffs' constitutional rights if these parties have not adopted rules in contravention to the blanket primary system or the primary system in general and submitted the rules to the State for approval. As stated at the conclusion of oral argument, the court wishes to revise the previously agreed-upon briefing arrangements to include an initial motion of the defendants on the question of whether a case or controversy is presented in the Third Amended Complaint of the Alaska Libertarian Party, the Alaskan Independence Party, and Mr. Coghill.[13]

The defendants have subsequently filed a motion to dismiss these plaintiffs' third amended complaint for lack of subject matter jurisdiction on ripeness grounds.

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[12] Clerk's Docket No. 72.

[13] *Id.* at n.30.

DISCUSSION

Motion to Dismiss

The issue of whether a claim is ripe for review bears on the court's subject matter jurisdiction under Article III of the United States Constitution. Accordingly, a ripeness challenge, like most other challenges to a court's subject matter jurisdiction, is treated as a motion to dismiss under Rule 12(b)(1), Federal Rules of Civil Procedure.

Challenges to subject matter jurisdiction through a Rule 12(b)(1) motion to dismiss come in two forms: facial and factual attacks. 2 *Moore's Federal Practice* § 12.30[4] (Matthew Bender 3d ed. 1997). A facial attack questions the sufficiency of the pleading. This requires the court to assess whether the plaintiffs have alleged a sufficient basis of subject matter jurisdiction; the court takes all allegations in the complaint as true. *Id.; see also Oaxaca v. Roscoe*, 641 F.2d 386, 391 (5th Cir. 1981). A factual attack challenges the facts on which jurisdiction depends and matters outside the pleadings such as affidavits and testimony may be considered without converting the motion into one for summary judgment. 2 *Moore's Federal Practice* § 12.30[4]; *Oaxaca*, 641 F.2d at 391-392. However, where the issue is one of ripeness:

> [t]he burden is on the plaintiff to allege in the complaint sufficient facts to establish the court's jurisdiction. The court will review the issue for ripeness at the time litigation is commenced. The matter must have been ripe for review at that time; subsequent ripening of the issue while the matter is under the court's consideration on a jurisdictional motion to dismiss is not sufficient to confer the court with jurisdiction that

did not originally exist when the action was initiated.

15 *Moore's Federal Practice* § 101.74. *See also People of Illinois v. General Electric Co.*, 683 F.2d 206, 209 (7th Cir. 1982) ("[T]echnicality though it may be, there is considerable doubt, to say the least, whether a federal court can acquire jurisdiction retroactively. *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 381-82, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884), holds that it cannot."). *But see Assiniboine and Sioux Tribes v. Board of Oil & Gas Conservation of Montana*, 792 F.2d 782, 788 (9th Cir. 1986) ("Because ripeness is 'peculiarly a question of timing,' we look at the facts as they exist today in evaluating whether the controversy before us is sufficiently concrete to warrant our intervention." (citations omitted)).

Ripeness

It is by now traditional law that " 'the judicial power does not extend to . . . abstract questions. . . . ' " *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 242 (1952) (*quoting Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 325 (1936)); *see generally Hillblom v. United States*, 896 F.2d 426, 430-31 (9th Cir.1990) (reviewing ripeness cases). The Supreme Court has indicated that ripeness is to be determined by the application of a two-prong test. *See Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), *overruled on other grounds, Califano v. Sanders*, 430 U.S. 99 (1977). Ripeness requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties

of withholding court consideration." *Id.*; *see also Assiniboine and Sioux Tribes*, 792 F.2d at 788. Ripeness is "peculiarly a question of timing." *Regional Rail Reorganization Cases*, 419 U.S. 102, 140 (1974). To determine whether a claim is fit for judicial decision, the court considers whether the issue is purely legal, whether, if pertinent, a final agency action has occurred, and whether the court or agency would benefit from postponement of review until agency action or policy has assumed a more concrete form. *Standard Alaska Production Co. v. Schaible*, 874 F.2d 624, 627 (9th Cir. 1989); *Assiniboine and Sioux Tribes*, 792 F.2d at 788. As to the hardship prong of the ripeness analysis, the court considers whether the subject of the challenge presents a true dilemma for the parties, or whether their course of action would be unlikely to be altered regardless of any decision that the court would render. 15 *Moore's Federal Practice* § 101.76 [2]. "Lack of ripeness will prevent review if the systemic interest in postponing adjudication due to a lack of fitness outweighs the hardship on the parties created by the postponement." *Chavez v. Director, Office of Workers Compensation Programs*, 961 F.2d 1409, 1414 (9th Cir. 1992).

A mere demand for declaratory relief by itself does not create a case or controversy. *Maryland Gas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 272 (1941). It follows, then, that in the absence of an actual case or controversy, a district court is without power to grant declaratory relief. *Id.* However, under the strictest interpretation of the ripeness doctrine, all declaratory judgment claims would be suspect because declaratory relief involves plaintiffs seeking to clarify their rights or obligations before an affirmative remedy is needed. The Supreme

Court has rejected that strict interpretation, upheld the constitutionality of the Federal Declaratory Judgment Act (*Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 228 (1937)), and recognized that: "[t]he difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree. . . . " *Maryland Cas.*, 312 U.S. at 273; *see also Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 297 (1979). Article III requires that there be a "substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas.*, 312 U.S. at 273. The existence of a contingency is sufficient to elicit a finding that the issue is not yet ripe for review. 15 *Moore's Federal Practice* § 101.80[4].

The State's present motion to dismiss does not attack the factual allegations made in plaintiffs' third amended complaint. Thus those allegations are taken as true. However, to augment its assertion that the third amended complaint does not state a ripe case or controversy as to the Alaskan Independence Party, the Libertarian Party of Alaska, and Mr. Coghill/Chryson, the State offers the affidavit of Sandra J. Stout, Director of the Division of Elections. Ms. Stout states in her affidavit that: (1) neither the Alaskan Independence Party nor the Libertarian Party of Alaska has, either formally or informally, requested the Division of Elections or the lieutenant governor to adopt regulations or implement other procedures concerning the nomination of candidates for state office; (2) to her knowledge, neither party has submitted a pre-clearance request to the United States Department of Justice under

Section 5 of the Voting Rights Act of 1965[14] for rules or bylaws that would authorize the nomination of candidates affiliated with those political organizations by a means other than the blanket primary election authorized by state law; and (3) the State has not submitted a preclearance request to the United States Department of Justice seeking to authorize the nomination of candidates affiliated with these parties by means other than that currently authorized by state law.[15] The plaintiffs contest none of the above.

Finally, the State brings to this court's attention the fact that state law provides a procedure for obtaining final agency action on the First Amendment claims of these political party plaintiffs. The State submits that the parties' desired formats for selecting nominees should be made the subject of a petition for the adoption of administrative regulations under AS 44.62.220.

> Unless the right to petition for adoption of a regulation is restricted . . . an interested person may petition an agency for the adoption or repeal of a regulation. . . . The petition must state clearly and concisely
>
> (1) the substance or nature of the regulation, amendment, or repeal requested;
>
> (2) the reasons for the request;
>
> (3) reference to the authority of the agency to take the action requested.

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[14] Pub. L. No. 89-110, 79 Stat. 439 (codified at 42 U.S.C. § 1973c).

[15] Affidavit of Sandra J. Stout, Clerk's Docket No. 77.

AS 44.66.220. After the petition is received, the division of elections would have 30 days to either deny the petition in writing or schedule a public hearing. AS 44.66.230. The State submits that until these plaintiffs submit a petition and final agency action is rendered, this court should defer review.

The plaintiffs offer very little to support this court's jurisdiction from the time this suit was filed, let alone from the date of the filing of the third amended complaint on July 31, 1997. As noted above, the third amended complaint does not state that these political parties have taken any action to institute a nomination procedure in contravention to the state's blanket primary law. The Alaskan Independence Party submits for this court's review Rule 5.15 of its bylaws as proof of its intention to nominate candidates in a manner that conflicts with state law. That rule states:

> In any election for public office where the Alaskan Independence Party is authorized by law to nominate a candidate, the State Committee shall be empowered to present a nominee in the name of the Alaskan Independence Party or to reject a candidate not an Alaskan. [16]

Interestingly, the Alaskan Independence Party offers Article IX of its bylaws as an exhibit to evidence that its controversy with the State is ripe. That article, titled "Primary Elections", only evidences the lack of a controversy when its preamble states:

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[16] Plaintiffs' Opposition to Motion to Dismiss, Ex. A at 6, Clerk's Docket No. 82.

> The Alaskan Independence Party (AIP) believing in the principle of voting for the individual, does establish an open primary election which lists all parties' candidates for office, consistent with applicable law.[17]

Finally, the Alaskan Independence Party argues that circumstances mandate immediate review by this court because a person formerly of the Green Party of Alaska has decided to run as an Alaskan Independence Party candidate for governor in the primary election and the party needs a way to get this candidate off the ballot.

As to the Libertarian Party of Alaska, its opposition to the motion to dismiss states that it is not a ballot-qualified party, but explains that it is in the process of securing the sufficient number of registered members to be ballot-qualified for the 1998 general election. It notes that it will not be able to meet the filing deadline for the 1998 primary election, and thus needs an alternate way to submit a party candidate for the general election. Thus, it requests declaratory relief from this court allowing it to nominate a candidate in a manner that does not conform with state law.

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[17] The Alaskan Independence Party pointed this court only to bylaw rule 9.02 which permits a voter who has voted in that party's primary to vote in the primary election of another party, so long as state law permits the double voting. The party offered this to show that their rules are in contravention to state law; however, there is no conflict if the rule comes into effect only if state law permits it. More importantly, Article IX's preamble, quoted above, evidences the party's support for the blanket primary system rather than its opposition to it. This cannot be ignored.

This court's analysis of the issue of ripeness is guided by the very basic proposition that this court's subject matter jurisdiction must exist from the time suit is commenced, and cannot be acquired retroactively. *People of Illinois,* 683 F.2d at 209.

It is apparent from plaintiffs' third amended complaint that this complaint is not fit for judicial decision and that a hardship will not be inflicted upon the parties should judicial determination be withheld.

The Alaskan Independence Party alleges its desire to control and select candidates by convention, should it desire to so. No action has been taken to adopt an approach to the nomination of party candidates in contravention to the blanket primary system. In fact, the party's bylaws expressly support the blanket primary system. No bylaw in contravention to state law has been submitted to the State or to the Justice Department for approval or preclearance. The Alaskan Independence Party desires an advisory opinion from this court defining in the abstract what their First Amendment rights would be should the party attempt to nominate candidates in a manner other than what is provided by state law. This court's jurisdiction does not extend that far. Nor will a hardship be inflicted on the party should a judicial determination be withheld. The third amended complaint alleges no facts that would require this court to step in to define this party's rights before it has adopted a nomination process that is in contravention to the state blanket primary system. Because the Alaskan Independence Party's suit is not ripe, neither is the suit of its member, Mr. Coghill/Chryson.

The Libertarian Party of Alaska also fails to present a ripe claim to this court. The Libertarian Party of Alaska states that it opposes the primary election system as a concept and desires that each party have the right of self-control over the nomination of its candidates.[18] The party states that it is presently being harmed because the State mandates a blanket primary election, thus depriving the party of its right to control its own candidate selection process.[19] No allegations are made defining how that party would otherwise select candidates, or that a request was made to the State to implement the same, or that pre-clearance had been sought from the United States Department of Justice. There is nothing alleged that would evidence an actual dispute fit for judicial resolution. There is nothing alleged in the third amended complaint evidencing undue hardship to the party by postponing judicial intervention. Again, this party seeks an advisory opinion declaring the party's rights in the abstract. This court is without jurisdiction to do so.

This court is aware of case law which asks the court to "look at the facts as they exist today in evaluating whether the controversy before [it] is sufficiently concrete to warrant [its] attention." *Assiniboine & Sioux Tribes*, 792 F.2d at 788. This court is of the impression that this approach is misguided because if a court lacks subject matter jurisdiction to begin with, it has no ongoing jurisdiction to review the facts at present. The plaintiffs' option at that point would be to file a new action. However, even the facts as they exist today do not present a

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[18] Third Amended Complaint at ¶ 4, Clerk's Docket No. 58.

[19] *Id.*

ripe claim. The Alaskan Independence Party (and the Libertarian Party of Alaska) still has not adopted bylaws that conflict with the blanket primary law or the primary election approach in general. They have submitted no proposed regulation(s) to the state proposing a nomination process. Indeed, the bylaws of the Alaskan Independence Party state their support of the blanket primary system. There is no evidence of an actual dispute fit for judicial resolution.

Nor is there evidence that undue hardship will be inflicted on the plaintiffs if judgment is withheld. The Alaska Independence Party's argument – that it must stop an "interloper" from securing the party's nomination for governor in the 1998 elections – does not require immediate judicial intervention. The nomination is secured only by the election of those voting on the office. The party's option is to run a candidate against the "interloper" in the primary election. Nor is it apparent that the Libertarian Party of Alaska requires immediate intervention so it may nominate candidates for the general election in 1998. Even if the third amended complaint made the allegations asserted in this party's opposition memorandum, it appears the party may still nominate candidates as a political group by petition. *See* AS 15.25.120, .180-.190. Thus immediate review in light of the upcoming primary elections is not necessary.

This court concludes that the systemic interest in postponing adjudication due to lack of ripeness outweighs the hardship, if any, on the parties created by a postponement. *See Chavez*, 961 F.2d at 1414.

This court is mindful that in the context of actions brought pursuant to the Declaratory Judgment Act to address impending violations of individuals' constitutional rights, the analysis of whether a claim is ripe for review is more relaxed than in the usual context. Where there is a "substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (*Maryland Cas.*, 312 U.S. at 273), this court has the discretion to step in to provide the relief requested. However, neither the Alaskan Independence Party nor the Libertarian Party of Alaska alleges sufficient facts in the complaint that would cause this court to exercise its discretion under the Declaratory Judgment Act to entertain these parties' claims. It is clear that the existence of a contingency is sufficient to elicit a finding that the issue is not yet ripe for review. 15 *Moore's Federal Practice* § 101.80[4].

Here there are multiple contingencies that prevent review:

> (1) neither party has adopted a bylaw in contravention to the blanket primary system – indeed, the Alaskan Independence Party's bylaws existing at the time of suit, or at least before the third amended complaint was filed, support the blanket primary system;[20]

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[20] Those bylaws mentioned by the Alaskan Independence Party in their opposition to the motion to dismiss as being in contravention to state law (*i.e.*, nomination by the party and participation of voters on more than one party's primary election) state that they would operate only where state law authorizes the requested action. Thus there is no conflict with state law.

(2) neither party has utilized the process provided by state law for obtaining final agency action on their First Amendment claims; and

(3) neither political party has requested pre-clearance from the Justice Department defining the legality of their requests under the Voting Rights Act of 1965.[21]

Noting these contingencies, this court concludes that no case nor controversy is presented against the State in the Alaskan Independence Party's, the Libertarian Party of Alaska's, or Mr. Coghill/Chryson's third amended complaint or at the present time. In the absence of an actual case or controversy, this court is without power and jurisdiction to grant the declaratory relief these plaintiffs request. The State's motion to dismiss is granted.

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[21] The political parties argue that the third factor should not be considered a contingency to this court exercising its discretion under the Declaratory Judgment Act because an opinion from this court on the extent of the parties' First Amendment rights would assist them in getting pre-clearance from the Department of Justice of their yet-to-be-defined manner for nominating candidates for the general election. What this argument ignores is that any relief this court might grant that would eventually result in a political party rule would have to be submitted to the Department of Justice for pre-clearance. The Justice Department reviews the rule for compliance with the Voting Rights Act of 1965. Compliance with the Voting Rights Act is not an issue before this court, and thus is a contingency to enforcing any order that would be issued by this court should it exercise review. This evidences that the dispute is not ripe. Even if this third factor were not a contingency, however, the two other factors mentioned above clearly are, and are sufficient in themselves to support a finding of lack of ripeness.

Motion for Reconsideration

The State requests this court to reconsider its decision on the application of the doctrine of issue preclusion to plaintiffs Alaskan Independence Party and Libertarian Party of Alaska in its order of February 10, 1998.[22] The State suggests that the law as to privity was so undecided as to the question of whether these plaintiffs were provided a sufficient forum in the *O'Callagan v. State*[23] that the Alaska Supreme Court should be provided the opportunity to establish precedent on this question.

The State's request is denied. This court has discretion under Rule 407 of the Alaska Rules of Appellate Procedure to certify questions to the Alaska Supreme Court only where there is no controlling precedent in the decisions of the supreme court of the state. That is not the case here. The issues of privity and issue preclusion have been addressed by the state supreme court[24] so that this court was able to apply guiding precedent to the issues before it. The court has issued a decision based upon that precedent. There is no need to reconsider or certify decided issues to the Alaska Supreme Court. The State's motion for reconsideration is therefore denied.

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[22] Clerk's Docket No. 72.

[23] 914 P.2d 1250 (Alaska 1996), *cert. denied*, 117 S. Ct. 1690 (1997).

[24] *See Jackinsky v. Jackinsky*, 894 P.2d 650 (Alaska 1995); *Alaska Foods, Inc. v. Nichiro Gyogyo Kaisha, Ltd.*, 768 P.2d 117, 121 (Alaska 1989).

CONCLUSION

For the foregoing reasons, the State's motion to dismiss is granted as to plaintiffs Libertarian Party of Alaska, the Alaskan Independence Party, and Mr. Coghill/Chryson, and its motion for reconsideration is denied.

DATED at Anchorage, Alaska, this 3 day of April, 1998.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

WAYNE ANTHONY ROSS, et al., Plaintiffs, vs. STATE OF ALASKA, et al., Defendants.	)	No. A95-0053-CV (HRH)

ORDER

Case Status/Case Closed

The court is in receipt of a status report from the parties.[1] The parties report that it is the state's view that this case should be dismissed and that the plaintiffs have no objection to this disposition on certain conditions which strike the court as reasonable. In the latter regard, the plaintiffs do not wish to waive any right to appeal or any right to raise at a later date issues presented in this case but not decided by the court.

In consideration of the report of the parties, plaintiff's complaint, subject to rulings heretofore made by the court,[2] is dismissed without prejudice, each of the parties to bear their own costs and attorney's fees. This order

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[1] Clerk's Docket No. 92.

[2] It is the intent of the parties and the court that the doctrines of *res judicata* and collateral estoppel will apply as to substantive orders of the court filed in this case.

shall constitute the court's final judgment in this case, concluding the same as to all issues and all parties.

DATED at Anchorage, Alaska, this 13th day of July, 1998.

/s/ H. Russel Holland
H. Russel Holland, Judge
District of Alaska

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THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA AT ANCHORAGE

WAYNE ANTHONY ROSS, THE REPUBLICAN PARTY OF ALASKA, INC., THE ALASKA LIBERTARIAN PARTY, THE ALASKAN INDEPENDENCE PARTY, MARK CHRYSON and LINDA S. McKAY, Plaintiffs, vs. STATE OF ALASKA; STATE OF ALASKA; DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR FRAN ULMER, in her official capacity of Supervisor of Elections; SANDRA J. STOUT, in her official capacity of Director of the Division of Elections; and JOHN/JANE DOE, 1 through 10, Defendants.	**NOTICE OF APPEAL** Case No. A-95-053 CI (HRH)

Notice is hereby given that all plaintiffs/appellants in this case, Wayne Anthony Ross, The Republican Party

of Alaska, Inc., The Alaska Libertarian Party, The Alaskan Independence Party, Mark Chryson, and Linda S. McKay, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the Following orders of the United States District Court for the District of Alaska:

1. Final Order, Case Status/Case Closed, dated July 13, 1998, Docket No. 93.

2. Order, Case Status, dated May 19, 1998, Docket No. 90.

3. Order, Motion to Dismiss, dated April 3, 1998, Docket No. 86.

4. Order, Motion for Partial Summary Judgment, dated February 10, 1998, Docket No. 72.

5. Any and all other orders of the District Court which had the effect or contributed to the inability of the plaintiffs to obtain the relief requested from the District Court.

DATED at Anchorage, Alaska this 22nd day of July, 1998.

KENNETH P. JACOBUS, P.C.
Attorney for Plaintiffs

By /s/ Kenneth P. Jacobus
Kenneth P. Jacobus

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of July, 1998, true and correct copies of the Notice of Appeal, Representation Statement, 9th Circuit Civil Appeals Docketing

Statement and Transcript Designation Form were mailed to:

Jim Baldwin Esq.
Asst. Attorney General
Office of the Attorney General
Box 110300
Juneau, Alaska 99811

/s/ Kenneth P. Jacobus
Kenneth P. Jacobus

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAYNE ANTHONY ROSS; THE REPUBLICAN PARTY OF ALASKA, INC.; THE ALASKA LIBERTARIAN PARTY; THE ALASKAN INDEPENDENCE PARTY; MARK CHRYSON; and LINDA S. MCKAY Plaintiffs-Appellants, vs. STATE OF ALASKA; STATE OF ALASKA DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR FRAN ULMER and SANDRA J. STOUT Defendants-Appellees.	)	Ninth Circuit Docket No. 98-35720

BRIEF OF APPELLANTS

Appeal from the United States District Court
District of Alaska, Judge H. Russel Holland,
United States District Court No. CV-95-00053 (HRH)

KENNETH P. JACOBUS
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CORPORATE DISCLOSURE STATEMENT

The corporate appellant in this appeal, The Republican Party of Alaska, Inc., is a political non-profit corporation, and has no parent companies, corporate subsidiaries or affiliates, nor has this corporation issued shares to the general public.

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APPENDIX C – Bylaws of the Alaska Libertarian Party

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WAYNE ANTHONY ROSS; THE REPUBLICAN PARTY OF ALASKA, INC; THE ALASKA LIBERTARIAN PARTY; THE ALASKAN INDEPENDENCE PARTY; MARK CHRYSON; an LINDA S. MCKAY. Plaintiffs/Appellants, v. STATE OF ALASKA; STATE OF ALASKA, DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR FRAN ULMER, in her official capacity of Supervisor of Elections; SANDRA J. STOUT, in her official capacity of Director of the Division of Elections; and JANE/JOHN DOE, 1 through 10, Defendants/Appellees.	(Filed Jan. 7, 1999) Docket No. 98-35720 Dist. Ct. 95-0053 (HRH)

STATE OF ALASKA'S OPPOSITION TO MOTION REQUESTING TAKING OF JUDICIAL NOTICE

I. Introduction

Appellants ask the court to take judicial notice of a wide range of events that transpired during election campaigns for the 1998 gubernatorial election in Alaska. These events are set out in Attachment A to the motion. The state opposes this motion because the material alleged as fact is not relevant to the issues properly before the court on appeal and, if this material were relevant, the alleged facts would be disputed. According to the evidence rules:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Fed. R. Evid. 201(b). For the reasons set out below, the court should not take judicial notice of the material alleged as fact in Attachment A to appellants' motion because the alleged facts are not relevant to the appeal, are subject to reasonable dispute, and are not readily determined by resort to accurate sources.

II. The Alleged Facts.

A substantial part of the alleged facts set out in Attachment A are for the most part not facts at all but argumentative conclusions drawn from certain facts. These conclusions are drawn from an election campaign

that occurred *after* the District Court rendered its decision from which the appellants appeal. This appeal properly involves the correctness of the District Court's decision that appellants' claims are barred by the doctrines of ripeness and issue and claim preclusion. The facts alleged in Attachment A are not material to the questions of law pertaining to the grounds for dismissal properly before the court.

It is alleged in paragraphs 2 and 3 of Attachment A that political parties have no control over who sought party nominations at the 1998 primary election. This is a conclusion of law rather than fact and as a matter of law it is disputed by the state. If this case were to proceed to a trial on the facts alleged, the state would show that the Alaska Independence Party intended to prevent any candidate from seeking its nomination without a basis in rule or statute for that to occur. Nor did the party seek or obtain preclearance under Section 5 of the Voting Rights Act (42 U.S.C. § 1973c) of a rule closing its primary or limiting the qualification of candidates.[1] The state would also show that the AIP publicly opposed the Sullivan candidacy to the effect that she received few votes at the general election.

It is alleged in paragraph 4 of Attachment A that certain Republican candidates for governor had difficulty raising money for the primary election because of campaign finance laws. This is a conclusion which would be

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[1] Alaska is a jurisdiction covered under sec. 4(b) of the Voting Rights Act, as amended.

disputed by the state.[2] It is also a conclusion to allege that either Ross or Taylor would have been elected over Lindauer in a two person race for the Republican nomination. In any case, the fact of this hypothetical race is not relevant to the instant appeal.

In paragraph 5, the RPA asks the court to take notice that the candidacy of Lindauer disintegrated because of "his continued lying." To the knowledge of the state, the truthfulness of candidate Lindauer remains to be established in a hearing before the Alaska Public Offices Commission. It is a matter of speculation as to why the Lindauer candidacy failed, but in any case, the fact of the failed candidacy is not relevant to the instant appeal. Nowhere in Attachment A is the connection made that the failure of the Lindauer candidacy is the direct result of the Alaska open primary. It does not appear that the facts alleged concerning the nomination of Republican candidates have anything to do with the open primary. These facts have more to do with the remedies available to a political party that believes a candidate is no longer qualified to seek office under the party's banner, an issue that is not properly before the court on appeal.

In paragraph 6, the court is asked to take notice of the conclusion that the Lindauer campaign adversely affected the campaigns of Republicans for other state offices. The state would dispute this statement and can prove that in fact Republican candidates did not suffer as

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[2] The state and the Alaska Civil Liberties Union are currently before the Alaska Supreme Court litigating the validity of the campaign finance statutes. *State v. Alaska Civil Liberties Union*, Supreme Court No. S-8778.

a result of the negative publicity garnered by candidate Lindauer. In paragraph 9, appellants ask the court to take notice of a conclusion that the circumstances presented during the 1998 campaign indicated that "there was no way that the Republicans could have elected a candidate as governor of Alaska." This is pure speculation rather than fact, and even if true, there is no reliable connection between this "fact" and the state's open primary.

Finally, the court is requested to take notice of the conclusion that the recognition of the Republican Moderate Party will allow that party to "make mischief against the regular Republican Party" in future elections. Again, this is speculation on future events and not a proper subject for judicial notice, nor is it relevant to the appeal before the court.

III. The Material in Attachment A is not Appropriate for Judicial Notice.

It would be unfair for the court to take notice of the facts as requested by Appellants outside of the context of a trial-type procedure.[3] The state does not dispute the right of the appellate court to take judicial notice of new developments not considered by the District Court. However,

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[3] For purposes of argument on this motion, the state focused on certain of the "facts" alleged by appellants in Attachment A to the motion. By selecting some of the items set out in Attachment A for discussion, the state does not concede the truthfulness of other items not mentioned.

> [w]ith respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring that the matter be beyond reasonable controversy. This tradition of circumspection appears to be soundly based, and no reason to depart from it is apparent.

Rule 201, Federal Rules of Evidence, Notes of the Advisory Committee on 1972 Proposed Rules. In this case, as explained above the facts are in dispute and cannot be reliably and undisputably established short of a trial. Further, the facts are not relevant to a determination of the issues on appeal properly before this court.

The documents attached to the motion provide sufficient indication that facts set out in Attachment A to the motion on are not "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned." Exhibit 2 to the motion is an internal memorandum which reads like a political tract exhorting the RPA executive committee to dump the candidacy of Lindauer. The state does not question that the document was in fact written and delivered, but the truth of the content is highly questionable. Exhibit B contains newspaper articles including opinion columns which allegedly establish the general bad publicity generated by the Lindauer campaign. With all due respect to the print media, something appearing in print in a newspaper is not necessarily true. In summary, the material provided in support of the motion does not establish the reliability of the facts for which appellants request judicial notice.

IV. Conclusion.

For the reasons set out in this memorandum, appellants' motion to take judicial notice of the alleged facts set out in Attachment A to the motion should be denied. Before the court determines to grant judicial notice as requested, the state desires to be heard as to the propriety of doing so as provided in Rule 201(e) of the Federal Rules of Evidence.

DATED this 4th day of January, 1999

BRUCE M. BOTELHO
ATTORNEY GENERAL

By: /s/ James L. Baldwin
James L. Baldwin
Assistant Attorney General
Alaska Bar No. 7610071

BEST AVAIL

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WAYNE ANTHONY ROSS; THE REPUBLICAN PARTY OF ALASKA, INC; THE ALASKA LIBERTARIAN PARTY; THE ALASKAN INDEPENDENCE PARTY; MARK CHRYSON; LINDA S. MCKAY, Plaintiffs-Appellants, v. STATE OF ALASKA; STATE OF ALASKA, DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR FRAN ULMER, in her official capacity of Supervisor of Elections; SANDRA J. STOUT, in her official capacity of Director of the Division of Elections; JANE/JOHN DOE, 1 through 10, Defendants-Appellees.	No. 98-35720 DC # CV-95-00053 (HRH) Alaska ORDER (Filed Jul. 29, 1999)

Before: HUG, Chief Judge, TROTT and TASHIMA, Circuit Judges.

Appellants' motion to take judicial notice is DENIED. Appellees' motion to strike and stay briefing is also DENIED.

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